

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA**

KEVIN J. MERRITT,)	
)	
Petitioner,)	
vs.)	NO. CIV-09-1110-HE
)	
JANE STANDIFIRD,)	
)	
Respondent.)	

ORDER

Petitioner Kevin J. Merritt, a state prisoner appearing *pro se*, filed this action under 28 U.S.C. § 2254 seeking habeas relief. Consistent with 28 U.S.C. §636(b)(1)(B), the matter was referred for initial proceedings to Magistrate Judge Doyle W. Argo, who has recommended that the petition be dismissed *sua sponte* upon filing as being untimely. The magistrate judge concluded there was no basis for statutory or equitable tolling of the one year limitations period contained in the Antiterrorism and Effective Death Penalty Act.


The petitioner has filed an objection to the Report and Recommendation, claiming he was prevented by extraordinary circumstances beyond his control from timely filing his federal habeas petition. However, the petitioner does not claim to be actually innocent and has not shown that he diligently pursued his federal claims based on the convictions that he challenges in his petition.¹

¹*It appears from the petitioner's objection that the petitioner may not be "in custody" on the convictions he challenges here. See Report and Recommendation, p. 1 n.1, Objection, p. 8. The court concurs with the magistrate judge's decision to not construe the petition as including an attack on the petitioner's two subsequent enhanced convictions. See Report and Recommendation, pp. 7-8.*

Accordingly, the court concurs with the magistrate judge that the habeas petition is untimely and no basis for tolling the statutory period has been shown. The court adopts the Report and Recommendation and dismisses the petition.

IT IS SO ORDERED.

Dated this 18th day of December, 2009.



JOE HEATON
UNITED STATES DISTRICT JUDGE